82-1408

NO.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

ROSS MAGGIO,

Petitioner

Versus

JOHN FULFORD,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOLUME I—APPENDIX

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APPENDIX "A"

United States Court of Appeals Opinion

John FULFORD, Petitioner-Appellant,

v.

Ross MAGGIO, Jr.,
Warden, Louisiana State Penitentiary,
Respondent-Appellee.

No. 80-3932.

United States Court of Appeals,
Fifth Circuit

Nov. 29, 1982.

Louisiana prisoner sought federal habeas corpus. The United States District Court for the Western District of Louisiana, W. Eugene Davis, J., denied relief, and petitioner appealed. The Court of Appeals, Gee, Circuit judge, held that (1) petitioner suffered no substantial prejudice from *Brady* violation; (2) petitioner was not denied effective assistance of counsel; (3) denial of motion to proceed pro se was not abuse of discretion; and (4) where qualified psychiatrist's opinion that petitioner had paranoid delusions which rendered him incompetent to stand trail was uncontradicted and he recommended further examination, the state court committed constitutional error in not conducting further competency proceedings.

Vacated and remanded.

1. Constitutional Law 268(5)

Suppression of material evidence which is both requested by and favorable to the defense is a violation of due process irrespective of the good faith or bad faith of the prosecution. U.S.C.A. Const.Amends. 5, 14.

2. Criminal Law 627.5(1)

Guiding principle of *Brady*, which governs suppression of favorable material evidence on request by the defense is that a jury should be permitted to hear and evaluate all relevant evidence going to guilt or punishment and, to this end, it does not establish a constitutional right to discovery. U.S.C.A. Const.Amend. 5, 14.

3. Criminal Law 1166(1)

Prosecution's failure to produce, on discovery request, a police report on teletype relating to murder and third-party confession was not reversible error as no exculpatory fact could be discerned from teletype message, which described two suspects who differed in appearance from defendant but were similar to codefendant and stated that a third, undescribed suspect was also wanted for questioning; there was no indication that there was any source other than defense witness for information in teletype regarding vehicle being driven by suspects, and introduction of the confession would not have affected the outcome.

4. Criminal Law 627.5(1)

State's duty of disclosure of *Brady* material, i.e., requested exculpatory matter, is imposed not only on the prosecutor but also on the state as a whole, including its

investigative agencies and, hence, if allegedly suppressed confessions were held by police department the court would be compelled to conclude that, constructively, the state's attorney had both access to and control over those documents. U.S.C.A. Const.Amends. 5, 14.

5. Jury 33(1.3)

Evidence of racial composition of petit jury venire is a threshold requirement for comparing percentage of blacks on the venire with the percentage of blacks in the community at large, for purpose of showing that jury venire was unconstitutionally selected on grounds that blacks were exclusded. U.S.C.A. Const.Amend. 14.

6. Criminnal Law 1171.1(2)

To establish that a prosecutor's remarks were so inflammatory as to prejudice substantial rights of a defendant, the defense must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that in probability but for the remarks no conviction would have occurred.

7. Criminal Law 641.13(2)

Prosecutor's insinuation that defendant would not have been arrested were he not guilty and reference to defense expert witness as "Dr. Strangelove" were regrettable but did not rise to stature of constitutional error so as to warrant finding of ineffective counsel for failure to object. U.S.C.A. Const.Amends. 6, 14.

8. Constitutional Law 268.2(2)

Due process is denied an incompetent criminal defendant who is required to stand trial. U.S.C.A. Const.Amends. 5, 14.

9. Habeas Corpus 90

Absent a violation of constitutional rights, a federal habeas court must defer to a state court's fact-finding.

10. Criminal Law 625

Where qualified psychiatrist's testimony that, although defendant appeared to be well-oriented to time, place and person, he had paranoid delusions which rendered him incompetent to stand trail was unchallenged and psychiatrist recommended that, because of brevity of his examination, further evaluation was needed, the state court committed constitutional error in not conducting further competency proceedings, especially in view of lack of record support for reasons given for denying a competency hearing. LSA—C.Cr.P. art. 644; U.S.C.A. Const.Amend. 14.

11. Criminal Law 625

Where an accused establishes a prima facie case of incompetency through the introduction of expert testimony, it is incumbent on the trial court to delineate expressly its reasons for rejecting such testimony and such rejection must be supported by the record.

12. Criminal Law 641.4(1)

Once trial begins the right to defend in the proper person ceases to be absolute and at that point it is within the trial court's discretion whether to permit the accused to proceed pro se and in reaching its decision the trial court must balance whatever prejudice is alleged by the defense against such factors as disruption of the proceedings, inconvenience and delay, and possible confusion of the jury.

13. Criminal Law 1152(1)

Denial of a motion to proceed pro se, made after trial has begun, will be reviewed only for abuse of discretion.

14. Criminal Law 641.4(1)

Denial of motion to proceed pro se was not abuse of discretion where motion was made on date of trial and on the privious day defendant had requested a competency hearing.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, GEE and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

INTRODUCTION

After a jury trial in the District Court for the Fifteenth Judicial District of LaFayette Parish, Louisiana,

petitioner, John Fulford, was convicted of murder and sentenced to life imprisonment. His conviction was affirmed on appeal by the Louisiana Supreme Court, *Louisiana v. Nix*, 327 So.2d 301 (La. 1975), and certain related issues were considered by this court in a decision, *Fulford v. Klein*, reported at 550 F.2d 342 (5th Cir. 1977) (en banc). Here, Fulford advances thirteen issues disputing the district court's denial of his habeas petition. Some raise purely state concerns or are obviously meritless and therefore not deserving of extensive discussion. Others involve potentially problematic aspects of constitutional law and require detailed analysis.

The facts of the present action are well stated in *Louisiana v. Nix*, 327 so.2d 301 (La.1975). The following summation is offered as a guide to the reader. Frank Corso was shot and killed in an apparent burglary attempt on his home in 1971. After a celebrated murder trial, Fulford and his codefendants, Kirksey Nix and Peter Mule, were sentenced to life imprisonment. Their appeal to the Louisiana Supreme Court presented over 100 "bills of exceptions." All were denied. By this time, Fulford was proceeding primarily *pro se*. In 1976 Fulford entered the federal system as a habeas petitioner. Because of exhaustion requirements and other delays, the district court did not issue an order in the case until late 1980. Now, over ten years after his trial, we consider the constitutionality of Fulford's conviction.

I. *Suppression of Evidence.*

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), enunciates the general rule that suppression of material evidence, which is both requested by and favorable to the defense, is a violation of due process

irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S.Ct. at 1196. Against this background, Fulford first contends that the prosecution's failure to produce (1) a police report and teletype relating to the murder and (2) the confession of Donald Eugene Smith[1] is a *per se* violation of his constitutional guarantees. This argument misreads the primary admonition of *Brady*.

[2] The guiding principle of *Brady* is that a jury should be permitted to hear and evaluate all relevant evidence going to a defendant's guilt or punishment. *Id.* To this end, it does not establish a constitutional right to discovery. *Wetherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977). Rather, *Brady* requires the prosecution to make available to the defense all

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[1] Donald Eugene Smith, an inmate at the federal penitentiaary in Marion, Illinois, actually made two confessions to the present crime. The first confession is in the form of an affidavit dated December 4, 1971, in which Smith avers that he was in the custody of Jefferson Parish officials on April 28, 1971, and that he had attempted to confess "to the armed robbery and murder that occurred April 11, 1971, at the home of the old man who was killed." Smith claims that he committed the crime with one accomplice and that the two separated after the killing. Reference is again made to "the old man in the New Orleans home robbery," but Corso is not identified by name. The second confession is more conventional, naming an accomplice and specifying the victim. Smith contends that he and one Mike Famiglitti met in New Orleans on April 10, 1971, conspired at Famiglitti's girl friend's home in Gretna, and went to the Corso home the next night in a 1967 blue Mustang. According to Smith, the object of the robbery was $24,000 in cash and five kilos of heroin hidden in Mr. Corso's bowling ball bag. This affidavit is dated June 22, 1973.

It is clear that the prosecution could not have withheld the second Smith confession since it was apparently executed some 15 months after Fulford's trial. The first confession was apparently mailed to Jefferson Parish officials, but it is unclear whether it reached the office of the Orleans officials. Even assuming that the prosecution had received this statement before trial, there is little to connect Smith's confession to the Corso killing other than the reference to the murder of an old man in a New Orleans home.

requested exculpatory evidence in its possession. In the event requested evidence is not disclosed, *Brady* next requires a determination of whether the prosecution's actions or omissions resulted in substantial prejudice to an accused's defense. *United States v. Felts*, 497 F.2d 80, 82 (5th Cir. 1974) (per curiam); *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982) (rev'd on other grounds). As we note below, we are deeply troubled by elements of this claim, however, we do not find the prejudice necessary to warrant reversal.

It is undisputed that in response to a pretrial *Brady* request the prosecution stated that it held no evidence which the defense might find favorable. Through the good offices of an "insider" at the New Orleans police department, Fulford obtained the evidence that lies at the basis of the present claim. When the fact of this evidence was presented to the prosecution at trial, it again denied the existence of any exculpatory evidence within its files and stated that the police department also had no evidence to offer. The trial record reveals that this was at best an erroneous statement.

[3,4] While we find the turn of events rather suspicious, under the present circumstances Fulford suffered no substantial prejudice. Whatever its source, the disputed police report was used by the defense at trial for purposes of impeachment although it was not admitted into evidence. This report apparently stated that Mrs. Corso had told investigating officers that two men had broken into her home an shot her husband. Further, neither of the men described within the report matched Fulford's appearance. We note, without holding, that the report was in all probability wrongfully withheld by the prosecution. However, because the jury was able to hear and evaluate

the exculpatory information contained in the report we do not find reversible error.

Similarly, we find that the information contained in the teletype would be cumulative evidence at best and would not have contributed to a differing jury verdict. *See United States v. Benton*, 637 F.2d 1052 (5th Cir. 1981). The teletype message described two suspects who differed in appearance from Fulford, but were similar to his codefendants. However, the teletype also stated that a third, undescribed suspect was also wanted for questioning. We fail to discern the exculpatory effect of such a message.

In addition, the message stated that the suspects were driving a blue Mustang. At trial, Fulford's accomplice, James Knight, who was granted immunity in return for his testimony, stated that he drove a green Oldsmobile to and from the crime. Balanced against this was the testimony of one of the defendants' witnesses, Mr. Dittman, to the effect that he had seen a blue Mustang leaving the vicinity of the crime and that he had reported this to the police. Nothing in the record indicates that there was any source, other than Mr. Dittman, for the information in the teletype regarding the Mustang. Since the jury had an opportunity to evaluate the inconsistencies in the prosecution's case we do not find reversible error.

Although our ultimate conclusion must stand, our approach to the confession is a different matter.[2] Donald

[2] The State's duty of disclosure is imposed not only upon its prosecutor, but also on the State as a whole, including its investigative agencies. Therefore, if the confessions were held by the New Orleans police department we would be compelled to conclude that, constructively, the State's attorney had both access to and control over these documents. *See, United States v. bryant*, 142 D.C.App. 132, 439 F.2d 642, *on remand*, 331 F.Supp. 927, *aff's*, 145 D.C.App. 259, 448 F.2d 1182 (1971); *United States v. Jensen*, 608 F.2d 1349 (10th Cir.1979).

Smith confessed "to the armed robbery and murder, that occurred April 11th, 1971 at the home of the old man, who was killed" in New Orleans. Smith also claimed that he was the perpetrator of a number of robberies in other states and also attempted to exonerate two of his codefendants who were convicted of yet another robbery. Our reading of the record does not disclose whether this document was actually in the possession of the New Orleans police department. *See* note 1, *supra.* However, such a finding is not necessary to our conclusion. The totality of the evidence requires us to find that the introduction of Smith's confession would not have affected the outcome of Fulford's trial. Accordingly, any error would be harmless beyond a reasonable doubt. *See Clark v. Blackburn,* 632 F.2d 531 (5th Cir. 1980); *United States v. Lay,* 644 F.2d 1087 (5th Cir. 1981); *Wiggins v. Estelle,* 681 F.2d 266 (5th Cir.1982).

Two eyewitnesses identified Fulford as one of the perpetrators of the murder. An accomplice, turned government witness, placed him at the scene of the crime. His girlfriend implicated him in the events of that night. In sum the evidence was overwhelming. While the defense presented evidence to contradict the government's case, including alibi witnesses and a witness who strongly suggested that her lover had committed the crime, the jury obviously chose to believe that Fulford was guilty. We do not believe nor can we hold that a vague confession of a convicted felon would have overcome the prosecution's case. Were the evidence less substantial, the interests of justice would require a more complete explanation and inquiry into whether Smith's confession was actually of the New Orleans police department and by implication the prosecution. *See* notes 1 and 2, *supra.*

II. *The Jury Venire.*

[5] Fulford's next contention is that the jury venire was unconstitutionally selected because blacks were excluded under the same selection process held to be unconstitutional in *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). *Alexander* held that Louisiana's method for selecting veniremen was not racially neutral[3] and therefore presumptively violative of a black defendant's rights under the Due Process and Equal Protection Clause of the Fourteenth Amendment where no blacks served on that defendant's jury. 405 U.S. at 632, 92 S.Ct. at 1226. It is arguable that Fulford does not have the requisite standing to press such a claim,[4] however, on the present facts we need not reach this issue. Fulford has not submitted evidence to establish the racial composition of the petit jury venire, a threshold requirement for comparing the percentage of blacks on the venire with the per-

[3] The Louisiana system required prospective jurors to complete an information form which requested their race. Against this background the Court held that the petitioner made out a *prima facie* case of invidious discrimination in the selection of the grand jury that indicted him because the State could not adequately justify the disproportionately low number of blacks that served on juries as opposed to the percentage of blacks in the community at large. 405 U.S. at 631-632, 92 S.Ct. at 1225-1226.

[4] Facially, *Alexander* holds that the constitutional rights of a racially identifiable minority are presumptively violated under certain circumstances. It may be that the Court's decision in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), where it held that deprivation of a jury that does not represent a cross section of the community is violative of an accused's constitutional rights, permits Fulford to bring suit in accordance with *Alexander*, however, we have not and need not today define the precise interrelationship of these cases. Nor, in view of our disposition, need we consider the application here of our decision in *Watson v. United States*, 484 F.2d 34 (5th Cir. 1973), *cert. denied*, 416 U.S. 940, 94 S.Ct. 1944, 40 L.Ed.2d 291 (1974), that the principles enunciated in *Peters* had no retroactive application.

centage of blacks in the community at large. 405 U.S. at 630, 92 S.Ct. at 1225. Moreover, Fulford has not demonstrated that the selection process used in 1968 when Alexander was tried was still in effect four years later. In consequence, this argument presents no ground for habeas relief.

III. *Ineffective Assistance of Counsel.*

Fulford next raises the customary ineffective assistance of counsel claim. To this end he lists a number of "failures" on the part of his counsel, Wayne Mancuso. We note at the outset that within this circuit "[w]e interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* effective assistance." *Mackenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.1960) (emphasis original), *adopted on rehearing en banc*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). Against this standard, our review of the record reveals Fulford's claim to be without merit.

[6,7] Mancuso and his co-counsel Roehm West, preserved and presented over 100 points of error to the Louisiana Supreme Court. They effectively cross-examined witnesses and, in the face of eyewitness testimony, constructed a plausible defense theory. In light of our reading of the record we are not compelled to review each of Fulford's individual allegations of ineffective assistance. We must, however, address his assertion that Mancuso became so emotional after his final argument that he left the courtroom because in connection with this alleged event, and as a separate ground for reversal, Fulford con-

tends that the prosecution made prejudicial remarks during its rebuttal argument, remarks that went unchallenged owing to Mancuso's absence and resulted in substantial prejudice to his defense. The record reflects that the prosecution both insinuated that Fulford would not have been arrested were he not guilty and referred to the defense's expert witness as "Dr. Strangelove."

It is beyond peradventure that in federal habeas corpus actions, "[i]mproper jury argument by the prosecution does not present a claim of constitutional magnitude ... unless such argument is so prejudicial that the applicant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." *Bronstein v. Wainwright*, 646 F.2d 1048, 1056 (5th Cir. 1981), *quoting*, *Alvarez v. Estelle*, 531 F.2d 1319, 1323 (5th Cir.1976). To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the defense must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred. *Getchell v. United States*, 282 F.2d 681 (5th Cir.1960) (persistent misconduct and inflamatory statements reversible error); *United States v. Carrillo*, 565 F.2d 1323 (5th Cir.1978) (characterization of defendant as narcotics addict not reversible error); *United States v. Hughes*, 658 F.2d 317, 323 (5th Cir.1981) (prosecutor's remark that defendant looked like a drug dealer not reversible in light of substantial evidence).

As we noted above, the evidence against Fulford was substantial—if not overwhelming. While we might condemn the prosecutor's intemperate remarks on direct review, in light of the evidence we do not believe that they

deprived Fulford of a fundamentally fair trial. Moreover, considering the length of the trial and that it was highly publicized and emotional, counsel for both sides maintained admirable decorum. The prosecution's remarks at the end of such a hotly contested proceeding are regrettable. However, they do not rise to the stature of constitutional error.

Our analysis indicated that Fulford has presented neither evidence that Mancuso was absent during the prosecution's rebuttal argument nor sufficient ground to warrant a finding of ineffective assistance of counsel if he was absent. After Mancuso's closing argument, the court took a five-minute recess. When proceedings resumed, and immediately prior to the prosecution's rebuttal, the record reveals that Mancuso waived polling the jury. This suggests that Mancuso was present during the rebuttal, however we do not rest our conclusion on the probability that he did not absent himself. The record reflects that West, Fulford's other lawyer, played an active role in his defense and was present during the rebuttal argument. Why he did not object to the prosecution's statements is a matter of conjecture. It is possible that counsel concluded that an objection would underscore the prosecution's argument. In any event, we will not impose our conceptions of trial tactics, developed with the aid of hindsight and reflection, where a defendant's counsel has presented a vigorous and well reasoned defense. *Beckham v. Wainwright*, 639 F.2d 262 (5th Cir.1981).

IV. *Competency Hearing*

Fulford next alleges that his conviction was obtained unconstitutionally because the trial court denied a defense

motion to impanel a sanity commission.[5] Specifically, the petitioner argues that the medical testimony of Dr. McCray was unrebutted, and that the district judge abused his discretion by refusing to establish the commission.

[8] It is clear that due process is denied to an incompetent criminal defendant who is required to stand trial. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). A habeas petitioner who contends that he was entitled to a competency hearing must demonstrate that the trial court was aware of matters which raised at that time a "real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel." *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir.1973); *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir.1979).

Here, appellant offered the testimony of Dr. William McCray, a qualified psychiatrist, who examined Fulford in his cell for about 50 minutes on the day before trial. Dr McCray noted that an evaluation usually requires several sessions as well as a supporting evaluation from a clinical psychologist. Finding Fulford to be well oriented to time, place and person, Dr. McCray nevertheless testified that Fulford had paranoid delusions which rendered him incompetent to stand trial. Specifically, Fulford had told Dr. McCray that he was withholding the names of alibi witnesses who could prove his innocence for fear that they would be arrested and prevented from testifying in his behalf.

In its *per curiam* giving reasons for denying the

[5] La.Code Crim.Pro.Ann. Art. 644 empowers the trial court to appoint a commission of at least two qualified physicians to "examine and report upon the mental condition of a defendant."

motion, the trial court noted that Fulford "was oriented as to time, date and place and was cognizant of everything around him." The court further stated that it considered the motion a subterfuge on Fulford's part to effect a severance from his codefendants. Moreover, the court noted that the defendant called alibi witnesses who testified in his behalf. On appeal the Louisiana Supreme Court relied heavily on the trial court's observations of Fulford at the preliminary hearing and trial in holding that "[t]he judge's findings [were] amply supported by the record." 327 So.2d at 324. We do not agree.

[9] We are mindful that we are a federal court reviewing a state court conviction. In consequence, absent a violation of an accused's constitutional rights, we must defer to the state court's findings of fact. *See Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Summer v. Mata*, 449l U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Here, we cannot defer.

[10,11] The State urges that Fulford had the capability to assist his attorney but simply refused to do so. But if this refusal was based on his paranoid delusions, it cannot be successfully urged that Fulford was actually capable of assisting counsel. A more troubling aspect of the present issue is the trial court's finding that Fulford was trying to delay the trial, and possibly obtain a severance. Given the timing of the motion, and a subsequent request by Fulford for a severance, we would uphold the trial court if it had been confronted by a barebones motion, with only the statement of Fulford's attorney as support. That is not the present case. Dr. McCray's testimony was unimpeached. His qualifications as a psychiatrist were unchallenged by the prosecution. Although his examination was brief, it was precisely because of this brevity that he suggested

further evaluation was needed. On these facts, we believe that the state court committed constitutional error in not conducting further competency proceedings.

The State also insists that subsequent events confirmed that Fulford was misleading Dr. McCray. Two alibi witnesses did testify for Fulford. However, Fulford insists that he had other supportive witnesses, and that his codefendants' wives, rather than he, gave his attorneys the names of the women who testified on his behalf. Moreover, his attorneys stated that Fulford refused to assist in jury selection. We do not pass on the validity of appellant's contentions, for our plain answer is that we cannot determine from the record the extent to which Fulford took an active role in his defense.

We realize that "[t]he question [of competency] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope, supra,* 95 S.Ct. at 908. Because the vagaries of the human mind do not lend themselves to precise analysis, and because of the fundamental importance of ensuring that an accused be aware of and able to participate fully in his trial, procedural safeguards must be substantial barriers—not readily open to abuse or indiscretion. Under our system of laws we entrust judges and jurors, who are for the most part untrained in this area, to make ultimate determinations of competency. *See White v. Estelle,* 669 F.2d 973 (5th Cir.1982). It is of paramount importance—both to society and to the accused—that the fact-finding process and the determinations which evolve from that process be based upon information sufficient to permit a trier of fact reasonably to assess an accused's competency against prevailing *medical* and *legal* standards.

Because of Dr. McCray's testimony and the lack of support in the record for the reasons given by the trial judge for denying a competency hearing, we cannot, with the certitude befitting a federal court, affirm that Fulford possessed the mental competency to participate meaningfully in his[6] trial. *But, see State v. Nix*, 327 So.2d 301, 323-324 (La.1975). Accordingly, we remand the case to the district court for a determination of whether an adequate *nunc pro tunc* inquiry can be held regarding Fulford's competency in 1972. We do not define the exact contours of such an inquiry. The passage of time may make such an inquiry impossible. However, the nature of Fulford's alleged disorder and resolution of factual questions concerning his participation at trial may permit such a *post hoc* determination. *See Lokos v. Capps*, 625 F.2d 1258, 1268 at n. 5 (5th Cir.1980). We leave this determination to the district court. If it is found that a competency determination is not possible, then the State must either recharge and retry Fulford or release him from custody.

V. *Pro Se Defense.*

Fulford also contends that he was unconstitutionally denied the right to defend *pro se*, either with or without the assistance of counsel, in violation of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). If our remand results in a finding that Fulford was competent during his trial, the question of his right to defend *pro se* will resurface. Therefore, to avoid the possibility of yet

[6] Our holding today does not divest a trial judge of his discretion to determine the competency of an accused. Nor does it suggest that medical testimony may be rebutted only by testimony similar in kind. We do hold, however, that where an accused establishes a *prima facie* case of incompetency, through the introduction of expert testimony, it is incumbent upon the trial court to delineate expressly his reasons for rejecting such testimony and that such rejection be supported by the record.

another appeal, we now address this issue.

An examination of *Faretta* reveals its inapplicability to the present action. There the defendant, from the outset, refused court appointed counsel and indicated his preference to defend in proper person. The trial judge was aware of Faretta's decision several weeks before trial but nevertheless ordered him to be presented by the office of the public defender. Here, Fulford retained his own attorney and did not express his desire to defend in proper person until after the jury had been selected and sworn.

[12,13] While this circuit has not definitively ruled on the present issue, we find nothing in *Faretta* to suggest that the Court intended to overrule the numerous decisions holding that the trial court may properly deny a defendant's motion to defend *pro se* when it is not made until the day of trial. Accordingly, it is our view that once trial begins the right to defend in the proper person ceases to be absolute. At that point it lies within the trial court's discretion whether to permit the accused to proceed *pro se*. In reaching its decision, the trial court must balance whatever prejudice is alleged by the defense against such factors as disruption of the proceedings, inconvenience and delay, and possible confusion of the jury. *Accord, Sapienza v. Vincient*, 534 F.2d 1007, 1010 (2d Cir.1976); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979). We will review such a determination only for an abuse of discretion. *Id.*

[14] We note that ordinarily a dialogue between the court and the defendant will help effectuate consideration of the reasons underlying an accused's request. Such a dialogue will also assist in determining the trial court's probable reasoning in the grant or denial of an accused's motion where, such as here, the court has not expressly stated

its reasons. On the present facts the absence of such a dialogue is not fatal. The trial court was presented with a *pro se* motion made by a defendant who, the previous day, had requested a competency hearing. Since trial had commenced, the resolution of that motion was solely within the sound discretion of the trial court. We find no abuse.

Vi. *Remaining Claims.*

Fulford's remaining claims do not merit extensive discussion. Briefly, he asserts that he was denied both pretrial inspection of certain evidence and the right to testify. The record does not support the latter and the former has no basis in prevailing case law. *See White v. Maggio,* 556 F.2d 1352 (5th Cir.1977). Similarly, Fulford's allegations regarding the jury charge are not supported by the record.

For the reasons set forth above, we vacate the judgment below and remand the case to the district court for proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

APPENDIX "B"

Stay of Mandate

United States Court of Appeals
Fifth Circuit
Office Of The Clerk

600 Camp Street
New Orleans, LA 70130

February 2, 1983

Mr. William R. Campbell
Assistant District Attorney
619 South White Street
New Orleans, La 70119

No. 80-3932

JOHN FULFORD -vs- ROSS MAGGIO, JR.,
Warden Louisiana State Penitentiary

MANDATE STAYED TO AND INCLUDING
FEBRUARY 14, 1983

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41. FRAP.

Very Truly yours,

GILBERT F. GANUCHEAU, Clerk

By_____
Deputy Clerk

APPENDIX "C"

District Court Memorandum Opinion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

JOHN FULFORD — SECTION D

VS. — CIVIL ACTION NO. 760748

ROSS MAGGIO, JR., WARDEN,
LOUISIANA STATE PENITENTIARY

MEMORANDUM OPINION

(Filed Oct. 29, 1980)

During the night of April 10, 1971, three armed men entered the Corso family home on the New Orleans lakefront. While the men were in the last stages of forcing open the residence's rear door, they were seen by Mrs. Corso, who ran down the hall screaming for her husband. Mr. Corso, who had been sleeping, found a .32 caliber pistol and confronted the burglars. In the ensuing gun battle, Frank Corso was mortally wounded.

Following a police investigation, John Fulford was arrested, along with James Knight, Kirksey Nix and Peter Frank Mule; all four were later indicted for murder by the Orleans Parish grand jury. Knight was granted immunity and testified against the other three defendants who were tried jointly in Lafayette after a change of venue. Nix, Mule and Fulford were found guilty without capital

punishment and were sentenced to life imprisonment. On appeal, their convictions and sentences were affirmed by a unanimous court, *State v. Nix*, 327 So.2d 301 (La. 1975).

The petitioner now seeks a writ of *habeas corpus* on the basis of numerous alleged trial errors. Two grounds[1] advanced by the petitioner raise only questions of state law and its proper application, and therefore will not be considered by the court, *Skipper v. Wainwright*, 598 F.2d 425 (5th Cir. 1979).

The petitioner first contends that his constitutional rights were violated by the prosecution's withholding of favorable evidence despite a defense motion for its production. Specifically, the petitioner argues that a police report, police teletype message, and two confessions to the crime were not furnished to the defense, and that all four items contained sufficiently exculpatory evidence to warrant a new trial, *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

Fulford agrues that his attorney could have used the information in the police report to impeach Mrs. Corso, who apparently told the officers called to the scene that only two men had broken into the house, a discrepancy with her trial testimony. However, the petitioner's assertions that the police report was withheld are belied by the record which indicates that defense counsel cross-examined officer Treadaway on the basis of information contained in the report and elicited testimony from him concerning the inconsistent versions of the crime related by the victim's wife. The petitioner's alternative claim, that two different

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[1] Illegally constituted prosecution and illegal appointment of counsel.

reports are involved, is also not persuasive in light of the similarity of Officer Treadaway's testimony to the information contained in the allegedly withheld report.

The police teletype message was apparently not produced by the prosecution. The message warned law enforcement officials in neighboring states to watch for a 1965-1968 faded blue Mustang contained three men. Fulford argues that the reference to the Mustang was favorable since the prosecution was unable to connect any of the defendants with such a car. He also contends that the descriptions of two suspects in the teletype as fairly short men (5'5" and 5'9") was favorable to him since he is 6'6". However, the court's conclusion that Fulford's attorney had access to the police report forecloses any argument concerning the exculpatory nature of the blue Mustang red herring since a sighting of a similar vehicle was clearly mentioned in the report. Moreover, the petitioner's defense would not have been significantly improved by disclosure of the descriptions of *two* rather short suspects since a third undescribed suspect is mentioned in the teletype. Therefore, the petitioner has failed to demonstrate that the requested evidence might have altered the outcome of the trial, *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The petitioner also points to two confessions to the crime made by Donald Eugene Smith, an inmate at the federal penitentiary in Marion, Illinois. The first confession is in the form of an affidavit dated December 4, 1971, in which Smith avers that he was in the custody of Jefferson Parish officials on April 28, 1971, and that he had attempted to confess "to the armed robbery and murder that occurred April 11, 1971, at the home of the old man who was killed." Smith claims that he committed the crime with one

accomplice and that the two separated after the killing. Reference is again made to "the old man in the New Orleans home robbery," but Corso is not identified by name. The second confession is more conventional, naming an accomplice and specifying the victim. Smith contends that he and one Mike Famiglitti met in New Orleans on April 10, 1971, conspired at Famiglitti's girl friend's home in gretna, and went to the Corso home the next night in a 19 67 blue Mustang. According to Smith, the object of the robbery was $24,000 in cash and five kilos of heroin hidden in Mr. Corso's bowling ball bag. This affidavit is dated June 22, 1973.

It is clear that the prosecution could not have withheld the second Smith confession since it was apparently executed some 15 months after Fulford's trial. The first confession was apparently mailed to Jefferson Parish officials, but it is unclear whether it reached the office of the Orleans officials. Even assuming that the prosecution had received this statement before trial, there is little to connect Smith's confession to the Corso killing other than the reference to the murder of an old man in a New Orleans home. Finally, it is doubtful in light of the ample evidence introduced by the state that the Smith confession contained sufficiently exculpatory evidence that its introduction by the defense would have altered the trial's outcome. For these reasons, this ground for relief lacks merit.

Fulford next contends that the jury venire was unconstitutionally selected because black people were excluded under the same selection process held to be unconstitutional in *Alexander v. Louisiana*, 405 U.S. 625, 92 S. Ct. 1221, 31 L.Ed.2d 536 (1972). However, the petitioner has failed to submit evidence to establish the racial composition

of the petit jury venire, a threshold requirement for comparing the percentage of blacks on the venire with the percentage of blacks in the community at large. Moreover, Fulford has not demonstrated that the selection process used in 1968 when Alexander was tried was still in effect four years later. This argument therefore presents no grounds of *habeas* relief.

The petitioner argues that he was denied due process and the equal protection of laws because, as an indigent, he was unable to secure expert medical testimony to present when the trial court considered the appointment of a sanity commission. However, the record is clear that the petitioner retained Dr. William McCray, a qualified psychiatrist, who presented an opinion favorable to Fulford's position. Moreover, the record does not indicate the petitioner's raising the question of indigency to the court. Therefore, this contention lacks merit.

Fulford next alleges that his conviction was obtained unconstitutionally because the trial court denied a defense motion to enpanel a sanity commission. Specifically, the petitioner argues that the medical testimony of Dr. McCray was unrebutted, and that the district judge abused his discretion by refusing to establish the commission.

It is clear that due process is denied to an incompetent criminal defendant who is required to stand trial, *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). A habeas petitioner who contends that he was entitled to a competency hearing must demonstrate that the trial court was aware of matters which raised at that time a "real, substantial and legitimate doubt as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel," *Bruce v. Estelle*, 483 F.2d 1031,

1043 (5th Cir. 1973); *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir. 1979).

In the instant case, the petitioner offered the testimony of Dr. William McCray, a qualified psychiatrist, who examined Fulford in his cell for about 50 minutes on the day before trial. Dr. McCray noted that an evaluation usually requires several sessions as well as a supporting evaluation from a clinical psychologist. Finding Fulford to be well oriented to time, place and person, Dr. McCray nevertheless testified that Fulford had paranoid delusions which rendered him incompetent to stand trial. Specifically, Fulford had told Dr. McCray that he was withholding the names of alibi witnesses who could prove his innocence for fear that they would be arrested and prevented from testifying in his behalf.

In his *per curiam* giving reasons for denying the motion, the trial judge noted that Fulford "was oriented as to time, date and place and was cognizant of everything around him." He further stated that he considered the motion a subterfuge on Fulford's part to effect a severance from his codefendants. Moreovear, the judge noted that the defendant called alibi witnesses who testified in his behalf.

In light of the trial judge's opportunity to observe the petitioner at the preliminary hearings, the judge's decision to discount Dr. McCray's opinion (based as it was on limited observation) was not unreasonable. In addition, the fact that the petitioner overcame his alleged delusions of persecution and called his alibi witnesses detracts from his position that at the time of trial he was unable to assist in his defense. This ground is therefore without merit.

Fulford also contends that he was unconstitutionally denied the right to defend *pro se* either with or without the assistance of counsel, in violation of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, an examination of the *Faretta* case reveals its inapplicability in the instant suit. In *Faretta* the defendant from the outset refused court appointed counsel and indicated his preference to defend in proper person. The trial judge was aware of Faretta's decision several weeks before trial but nevertheless ordered the defendant to be represented by the office of the public defender. Here, Fulford retained his own attorney and expressed his desire to defend in proper person on the date of trial, after the jury had been selected. Nothing in *Faretta* suggested that the Court intended to overrule the numerous decisions holding that the trial judge may properly deny a defendant's motion to defend in proper person if the motion is not made until after the trial has begun. For this reason, this argument lacks merit.

The petitioner also alleges that he is entitled to *habeas* relief because he was denied the effective assistance of counsel. Particularly, Fulford, alleges that the representation afforded him by Wayne Mancuso was inadequate for the following reasons: Mancuso failed to seek an evidentiary hearing on the selection process of the petit jury venire; failed to object to the illegally constituted prosecution (assistant district attorneys from Orleans Parish participated in the removed prosecution); failed to advise the court that he had less than the five years of experience statutorily required to defend a murder charge; failed to verify an order for continuance, thereby causing it to be denied; failed to advise the court that Fulford was indigent and could not obtain expert medical testimony; failed to introduce a police report to impeach Mrs. Corso; failed to

press Sandra Decker, a prosecution witness, concerning discrepancies between her testimony and that of another witness about her arrival in New Orleans, and failed to ask Mrs. Corso if Ms. Decker had received a reward; failed to object to certain questions posed by the prosecutor and prejudicial statements from state witnesses; and failed to remain in the courtroom during closing argument, and thereby waived defense objections to prejudicial statements made by the prosecution in closing argument.

Several of these allegations are clearly without merit and may be disposed of summarily. For example, for counsel to have sought an evidentiary hearing on the selection process of the petit jury venire would have required anticipation of the decision in *Alexander v. Louisiana, supra.* Counsel's failuare to object to the allegedly improper prosecution also begs the question whether the prosecution was illegally constituted and assumes without any support that an illegally constituted prosecution *per se* prejudices the rights of the defendant. Fulford also points to Mancuso's failure to verify a motion for continuance, but his conclusion that this failure resulted in the motion's denial is unsupported in the record. Mancuso's failure to inform the court of Fulford's indigency and his need to secure expert medical testimony is clearly frivolous; Fulford obtained medical testimony in his favor, and there is nothing in the record which shows that the issue of indigency was ever raised by the petitioner. There is also no support in the record for Fulford's assertion that Mancuso left the courtroom during the prosecution's closing statements.

The test for determining whether a defendant was denied effective counsel depends on counsel's status as appointed or retained. If counsel was retained, his represen-

tation must be "so grossly deficient as to render the proceedings fundamentally unfair," *Kallie v. Estelle*, 515 F.2d 588, 591 (5th Cir. 1975); for appointed counsel, the representation must be reasonably effective, *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974).

Some question exists whether Mancuso was retained or appointed counsel. Although Fulford initially retained Mancuso, Mancuso stated while pressing a motion to continue that he would withdraw if the case was not continued. At that point, Judge Schulingkamp of the Orleans Criminal District Court refused to continue the case or to let Mancuso withdraw, and told him he was appointed to the case. Because some ambiguity exists concerning Mancuso's status at the time of trial, his actions will be evaluated as though he had been appointed to represent Fulford.

Fulford alleges that Mancuso failed to inform the trial judge that he had less than five years of experience required by Article 512 of the Louisiana Code of Criminal Procedure for appointed counsel in capital cases. However, this argument appears frivolous in light of the fact that Fulford voluntarily retained Mancuso, at least at the beginning of the prosecution. Moreover, the trial judge clearly noted his surprise that Mancuso had less than the requisite five years of experience and praised the attorney's effort in representing his client. Fulford failed to show that Mancuso's lack of experience prejudiced his defense.

The record supports Fulford's allegations that Mancuso failed to introduce a police report to impeach Mrs. Corso concerning the discrepancies between her testimony and the reports and affidavits prepared by police officers following the crime. Later, when Sandra Decker stated

that she arrived in New Orleans on the Thursday night before the crime, Mancuso did not point out that James Knight had testified that she arrived on the following evening. The record also supports Fulford's contention that his attorney never asked Mrs. Corso if Sandra Decker had received a reward in connection with the crime. However, these failures, considered either individually or in the aggregate, do not demonstrate that the petitioner received ineffective representation. Although Mrs. Corso's testimony at trial differed in some respects from the reports prepared by police officers, the impeachment value was certainly not great since Mrs. Corso was under stress at the time she was interrogated by the police and did not prepare or check over the reports. The discrepancy between Decker's and Knight's testimony concerning her arrival time in New Orleans is also minor. Had defense counsel pressed the point, Ms. Decker could have answered quite logically that Knight was mistaken or that his memory was faulty after a year's delay. Although Mancuso did not ask Mrs. Corso if Sandra Decker had received a reward, nothing besides the petitioner's self-serving allegations suggests that such was the case.

The record also supports the petitioner's allegations that counsel did not object to certain questions posed by the prosecutor or allegedly prejudicial statements made by prosecution witnesses. At one point, the prosecutor asked one of Fulford's alibi witnesses if she had contacted the authorities. Fulford argues that this question was objectionable under *United States v. Young*, 463 F.2d 934 (D. C. Cir. 1972), but a review of the *Young* decision reveals that the reviewing court held such questioning not to constitute reversible error. Therefore, counsel's failure to object to the question was not remiss. Fulford also argues that counsel was in error not to object when Sandra Decker stated that

she had gone to Peter Mule's trailer to discuss a bank robbery. However, the petitioner fails to explain how this reference to a robbery plotted by a co-defendant prejudiced him, or why his attorney, who did not represent Mule, should have objected at this point. Decker also testified without objection that she had previously seen a silencer on Fulford's pistol, but the petitioner admits that no evidence was introduced at trial concerning a silencer in the Corso killing. Although the reference to the silencer may have been objectionable as irrelevant, the defense attorney's decision not to object did not deprive petitioner of a fair trial. For these reasons, Fulford's argument that he was denied the effective assistance of counsel are without merit.

The petitioner alleges that he was denied the right to testify in his own behalf and was denied a full and correct transcript on appeal. Both contentions are meritless. The record reflects that Fulford was told by the trial judge to sit down and be silent when he arose and attempted to take the stand either while the jury was out and counsel were arguing evidentiary points or during the state's case. The petitioner has failed to demonstrate that the trial judge ever denied him the right to testify in his own behalf when asserted at a proper time. Fulford also contends that he was denied a full transcript on appeal because the transcript did not contain his version of these events, a clearly frivolous claim. Therefore, no ground for *habeas* relief is presentedby these contentions.

The petitioner also advances the argument that the trial court erred by not permitting the defense an opportunity to examine the murder scene and several items of physical evidence introduced at trial. Fulford relies on *White v. Maggio,* 556 F.2d 1352 (5th Cir. 1977) for the

proposition that fundamental fairness is denied a criminal defendant who is not afforded an opportunity to have his own expert examine critical evidence which is subject to varying expert opinion. See also *Barnard v. Henderson*, 514 F.2d 774 (5th Cir. 1975).

In his *per curiam*, the trial judge indicated that he had denied the defense motion for inspection of photographs, charts and diagrams of the Corso home on the basis of *State v. Square*, 257 La. 743, 244 So.2d 200 (1971). However, the court noted that the defendants were allowed to visit the scene and were therefore afforded an equivalent of the discovery they sought.

In his application, the petitioner argues that pretrial discovery should have been granted him with respect to various items found at the scene of the crime, including the alleged murder weapon, a porta power jack used to knock down the rear door of the residence, handcuffs, a police radio, cutting pliers, brief cases, a portable telephone, crowbars, screw drivers and other evidence (apparently a reference to spent casings and pellets from the murder weapon).

In *White v. Maggion, supra*, the Fifth Circuit determined that the defendant had been deprived of due process when he was denied the opportunity before trial to have an expert examine pellets introduced by the state and alleged to have been fired from the defendant's gun. The pellets were also the only tangible evidence connecting White to the crime. The appellate court concluded that a denial of access to evidence violates fundamental fairness if the evidence is critical to the conviction and is subject to varying expert opinion.

Under this two-prong test, it is apparent that the state's refusal to allow the defense to examine the porta power jack, police radio and other similar items did not deny Fulford due process because the items are not subject to varying expert opinion, as were the pellets in *White*, and in fact no experts examined the evidence for the state. Fulford's argument with respect to the casings and pellets is equally unavailing. Although the casing and pellets are obviously subject to varying expert interpretation, they do not meet the standard for critical evidence expounded in *White*, "evidence that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction." 556 F.2d 1352, 1357, 1358. In the instant case, unlike *White*, where only the pellets connected the defendant with the crime, ample evidence, including the testimony of accomplices, was offered to prove Fulford's involvement in the crime. For these reasons, this ground for relief is without merit.

Fulford's final ground for obtaining *habeas* relief concerns allegedly improper arguments made by the prosecutor during his closing argument. In the first instance, the district attorney stated that the police were concerned with catching the right man and were not fabricators or over-eager rookies who would frame someone in order to solve a case. A second instance of improper argument occurred when the prosecutor called the defense expert "Dr. Strangelove," stated that he always testified for the defense, and told the jurors to discount his testimony. Later, the prosecutor stated that in his opinion certain defense alibi witnesses were "lying in their teeth."

Although these remarks would require a reversal if they had been made in a federal prosecution, a state prosecution is to be reversed for improper argument only if the

trial was thereby rendered fundamentally unfair, *see Kozhovsky v. Estelle*, 546 F.2d 1185 (5th Cir. 1977); *Malley v. Manson*, 547 F.2d 25 (2nd Cir. 1976). While it is clear that the argument was improper, it is doubtful whether the prosecutor's argument denied Fulford a fair trial in light of the strong evidence introduced against the defendants. Moreover, the fact that defense counsel did not object to any of these comments, while not dispositive, suggests that trial counsel made the tactical decision not to object and thereby emphasize the prosecutor's statements in the minds of the jurors. (Fulford argues that defense counsel left the courtroom during closing argument, but the record does not support this allegation).

Fulford also raises as improper argument the district attorney's statement that after the judge charged the jury with the applicable law, *he* (the judge) would see that this was not a case of manslaughter. Although the record contains this statement, it seems obvious that this odd turn of phrase was either a slip of the tongue or an error in transcription. In any case, it is difficult to see how such a statement could have prejudiced Fulford since the jury was made aware by the trial judge's charge that it was responsible for deciding whether the killing was murder or manslaughter. For these reasons, this argument advanced by the petitioner is without merit.

From this review of petitioner's allegations, it is clear that they have no merit and that a hearing to determine their validity is not required. The petition for *habeas corpus* is denied.

Lafayette, Louisiana, this 27th day of October, 1980.

Judge, United States District Court